IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MIGUEL ACOSTA MARTINEZ,	)	
	)	
Appellant-Defendant below,	)	
	)	
v.	)	0808019298 WCC
	)	
STATE OF DELAWARE,	)	
	)	
Appellee-Plaintiff below.	)	

O R D E R

Submitted: January 5, 2010
Decided: April 29, 2010

Appeal from Court of Common Pleas Trial - AFFIRMED

Miguel Acosta Martinez, 2211 N. Heald Street, Wilmington, DE 19802. *Pro Se* Appellant.

Barzilai K. Axelrod, Esquire, Department of Justice, 820 N. French Street, Wilmington, DE 19801. Attorney for State of Delaware.

CARPENTER, J.

On this 29th day of April 2010, upon consideration of a *pro se* appeal from a criminal conviction in the Court of Common Pleas filed by Miguel Acosta Martinez ("Appellant"), it appears to the Court that:

1. On July 23, 2009, Appellant was convicted of various motor vehicle offenses, including: (1) Fictitious or Cancelled Registration Card, Number Plate or Tag - 21 *Del. C.* § 2115(2); (2) Operating an Unregistered Vehicle - 21 *Del. C.* § 2101; (3) Failure to Have Insurance Identification in Possession - 21 *Del. C.* § 2118(p); and (4) Driving While Suspended or Revoked - 21 *Del. C.* §2756(a). Because the Driving While Suspended or Revoked charge was a subsequent offense, a 60 day minimum mandatory jail sentence was imposed on Appellant. Appellant appeals that conviction.[1]

2. In accordance with the briefing schedule set forth on November 17, 2009, Appellant failed to file his Opening Brief due December 7, 2009. Without the guide of Appellant's Opening Brief to aid in its response, the State submitted its brief on December 28, 2009 addressing the issues noted in Appellant's "Notice to Brief" and also outlined in Appellant's November 8, 2009 letter to the Court. Appellant filed a letter response to the State's brief on December 31, 2009.

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[1] 11 *Del. C.* § 5301(c) provides: "From any order, rule, decision, judgment or sentence of the Court [of Common Pleas] in a criminal action, the accused shall have the right of appeal to the Superior Court in and for the county wherein the information was filed as provided in § 28 article IV of the Constitution of the State. Such appeal to the Superior Court shall be reviewed on the record and shall not be tried de novo."

3. From the various documents filed by both the State and Appellant the Court believes the Appellant is requesting a new trial based upon his disadvantage by proceeding without counsel[2]; alleged inaccurate information on the ticket generated by Officer Breslin[3]; Officer Breslin's failure to tow or confiscate Appellant's car based on fictitious or improper license plate tags[4]; the admission of evidence regarding Appellant's aliases[5]; Officer Breslin's presence at the State's table during jury selection[6]; Officer Breslin's motive in running Appellant's license plate tags[7]; and the lack of evidence regarding the fictitious or cancelled registration or license plate tags.[8]

4. When sitting as an intermediate court of appeals, the Superior Court functions the same as the Supreme Court.[9] In addition to correcting errors of law, this Court's scope of review extends to whether the factual findings made by the jury viewed in a light most favorable to the State are supported by the evidence.[10] If supported by the evidence, the findings of the jury "shall be conclusive."[11] The test

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[2] Appellant's Letter Nov. 8, 2009; State's Resp. 3-4.
[3] Appellant's Notice to Br. ¶ 4; State's Resp. 7.
[4] Appellant's Notice to Br. ¶ 5; State's Resp. 7; Appellant's Resp. 1.
[5] Appellant's Letter Nov. 8, 2009; State's Resp. 4-5; Appellant's Resp. 1.
[6] Appellant's Notice to Br. ¶ 1; State's Resp. 5.
[7] Appellant's Notice to Br. ¶ 2; State's Resp. 6.
[8] Appellant's Notice to Br. ¶ 3; State's Resp. 6-7.
[9] *Shipowski v. State*, 1989 WL 89667, at *1 (Del. Super. July 28, 1989).
[10] *Id.*
[11] *Id.* (citing Del. Const. art. IV, § 11(1)(a)).

to be applied in determining the sufficiency of the evidence to support a conviction is "whether the evidence, viewed in its entirety and including all reasonable inferences, is sufficient to enable a jury to find that the State's charges have been established beyond a reasonable doubt."[12]

5. Appellant first requests a new trial because he "[feels he] was at a legal disadvantage by not having proper representation such as a personal lawyer or public defender."[13] While the Sixth Amendment guarantees the right to counsel, it also recognizes the right of a criminal defendant to conduct his own defense.[14] Unfortunately, the record of the Court below fails to reflect that a colloquy between the Court and the Appellant occurred to advise the Appellant of the consequences and potential dangers of representing himself in criminal proceedings. While this should have occurred, it appears to the Court that the Appellant actively participated in the trial and there is no indication or objection by the Appellant that would indicate that the decision to represent himself was anything other than a voluntary and knowing waiver of his right to counsel.[15]

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[12] *Potts v. State*, 458 A.2d 1165, 1167 (Del. 1983) (citing *Holden v. State*, 305 A.2d 320, 322 (1973)).
[13] Appellant's Letter Nov. 8, 2009.
[14] *Browne v. State*, 1989 WL 114333, at *1 (Del. Aug. 30, 1989) (citing *Faretta v. California*, 442 U.S. 806 (1975)); *see also* Del. Const. art. I, § 7.
[15] State's Resp. 3-4 states: "Counsel of record informed the defendant that he was facing minimum mandatory 60 days jail time for his Driving While Suspended offense if convicted and specifically recalls asking him if he wanted to get a private attorney or a public defender given that he had two pending cases with identical charges. The defendant's articulate response was that he wanted to proceed *pro se* on both cases, did not want to waive a trial by jury on either case, and asked the State to call both of its officers in for trial. He further stated that he had not driven on the date in question and, in any event, the officer would not show up. The officers on both cases appeared."

This Court has previously noted that a *pro se* litigant cannot make the decision to represent himself and then request a new trial arguing that he had not performed up to the standards of a trained lawyer.[16] It appears that Appellant is trying to make that argument here. Appellant simply asserts he was at a "legal disadvantage" by representing himself and would like "another opportunity to be represented by legal counsel."[17] Unfortunately for the Appellant, this does not provide a ground to grant a new trial when the Appellant made a conscious decision to represent himself, which now in hindsight he believes may not have been the best decision. While the Court finds no errors of law and will deny Appellant's request for a new trial on this basis, it again emphasizes that it is important for the lower court to conduct an inquiry with a defendant who wishes to represent themself to insure he is fully aware of the obligations that will be imposed and the consequences of that decision. The failure to do so and to create a record of that discussion allows an argument to be made that the self representation decision was not intelligently and knowingly made.

6. Appellant also argues that the motor vehicle ticket contains inaccurate information about the Appellant.[18] More specifically, the ticket issued by Officer Breslin identifies the driver as an African-American male while the Appellant is Hispanic. When questioned about the inaccuracy during trial, Officer Breslin

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[16] *State v. Tatum*, 2008 WL 2601390, at *1 (Del. Super. June 27, 2008).
[17] Appellant's Letter Nov. 8, 2009.
[18] Appellant's Notice to Br. ¶ 4.

explained that when a name is entered into the e-ticket program the race and sex fields are automatically generated based on prior offenses[19] and that none of those fields are manually entered by the Officer himself.[20]

The Court finds that the pedigree information generated in the electronic ticket is not critical to or an element of the offense. Therefore, its only relevance is in questioning the credibility of the officer regarding whether the ticket was actually issued to the Appellant or some other individual or to demonstrate some bias by the officer. This was done by the Appellant at trial and therefore it does not create a legal issue that now justifies reversal.

7. Next, Appellant argues that under state law, Officer Breslin should have towed Appellant's vehicle if his license plate tags were fictitious or illegal, as charged by the Officer.[21] On cross-examination, Appellant asked: "…so you didn't take the tags or actually aren't you supposed to take the tags and tow the car and…" Officer Breslin responded: "I don't have to, like I said we were on private property, I gave you the courtesy –."

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[19] Trial Tr. 23, July 23, 2009.
[20] *Id.* at 24 (Breslon - Cross: "Like I previously explained, under your name, I don't know if you identified yourself as Black, non-Hispanic in the past, this is all identified off of what comes through your name and your State Bureau of identification number; that's already what's in the system, that's not something that I enter").
[21] Appellant's Resp. 1.

Again the only relevance to the fact that the officer failed to tow the Appellant's vehicle would be to potentially demonstrate to the jury that the failure to do so established that the charge was improper and that the officer's testimony as to this offense should not be considered credible. However, this issue was raised by the Appellant and it was within the discretion of the jury to decide the significance of the failure to tow the vehicle or whether the officer's explanation was reasonable. It appears the jury decided to accept the officer's explanation and nothing more was required.

8. Next, the Appellant has raised several issues not presented to the trial court. As a general matter, an appellate court will decline to review any issue not raised and fairly presented to the trial court for decision. However, where substantial rights are jeopardized and fairness of trial imperiled, an appellate court will apply the plain error standard of review.[22] The doctrine of plain error is limited to material defects which are apparent on the face of the record, which are basic, serious, and fundamental and which either clearly deprives the accused of substantial rights, or which clearly show manifest injustice.[23] Such a determination must "be so clear that the trial judge and prosecutor were derelict in countenancing it, even absent the Defendant's timely assistance in detecting it."[24]

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[22] *Stevenson v. State*, 1999 WL 464524, at *2 (Del. Super. Apr. 27, 1999).
[23] *Id.*
[24] *Id.*

9. First of such issues is the Appellant's assertion that he lacked sufficient knowledge to have the ability to dispute the admission of certain evidence.[25] Appellant indicates that the evidence had some relation to his aliases[26] but does not state the specific piece of evidence in question. From this the Court surmises that the evidence Appellant refers to was the certified driving record submitted by the State[27] which did contain information regarding the Appellant's aliases.

This Court cannot find that any plain error occurred with the admission of this document. A proper foundation for the document was laid by the State[28] and Appellant had an opportunity to inspect the document prior to its admission.[29] Furthermore, Appellant's argument that he did not know he could dispute the admission of evidence is unfounded based on the trial transcript. The trial transcript shows the following:

Mr. Axelrod:	Your Honor, at this time the State would ask to move the certified driving record as well as the notice of revocation, along with the affidavit into evidence as State's Exhibit 1 pursuant to 21 *Del. C.* § 276.
The Court:	Mr. Acosta, do you have any basis that you could object to that being marked as an exhibit?
Mr. Acosta:	As far as his – about the name?

[25] Appellant's Letter Nov. 8, 2009.
[26] *Id.*
[27] Trial Tr. 17, July 23, 2009; State's Ex. 1.
[28] Trial Tr. 12-17, July 23, 2009.
[29] *Id.* at 17-18.

The Court:	Excuse me. Do you have any legal basis to offer to the Court why the exhibit that is now for identification cannot be marked as a State exhibit?
Mr. Acosta:	Yes, I do.
The Court:	What is your reason? Stand, please; tell me what your reason is.
Mr. Acosta:	The reason is because I have a long name and he was talking about was the thing –
The Court:	We're speaking about this paper, regress your reasons to this paper.
Mr. Acosta:	Actually, no, you can use it because I'm going to use it against him.[30]

The dialogue shows that the trial court gave Appellant several opportunities to present a legal basis for not admitting the evidence. It is also clear from the transcript that the Appellant not only allowed the document to be entered into evidence, but also believed that the document would assist Appellant's own case. Plain error cannot be found under such circumstances.

10. Next, Appellant argues that Officer Breslin "should not have been present when assigning [the] jury."[31] While it is clearly the better practice for jury selection to occur outside the presence of the investigating officer or witness, the Supreme Court has noted that a violation of actual or inherent prejudice is found only when the police are permitted to assist in the jury selection process.[32] This is because

[30] *Id.*
[31] Appellant's Notice to Br. ¶ 1.
[32] *Shields v. State*, 374 A.2d 816, 820 (Del. 1977); *see also Jackson v. State*, 1993 WL 258704, at *6 (Del. Super. June 15, 1993).

the practice tends to ingratiate the police witnesses in the eyes of the jury and such apparent association with the 'convening' of the Trial Court tends to enhance unfairly the credibility of the police witnesses and denigrate that of defense witnesses.[33]

Here, the record does not indicate that Officer Breslin was present when jury selection occurred but it appears from the State's brief that they acknowledge that he was. While the practice of allowing officers to be present during jury selection should be discontinued by the State, there is nothing to suggest the officer assisted or participated in the jury selection process. As such, this Court cannot find any plain error.

11. Appellant also argues that "Officer [Breslin] did not have any motive to run [Appellant's license plate] tags." Although not specifically stated, the Court believes what Appellant is trying to argue is that the officer had no reasonable articulable suspicion or probable cause to run his license plate in violation of his privacy rights.[34]

While it does not appear that this issue has been previously addressed here[35], other jurisdictions have addressed this issue by asking whether an individual has an

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[33] *Id.* (citing *Bailey v. State*, 363 A.2d 312, 316-17 (Del. 1976)).
[34] Appellant's Notice to Br. ¶ 2 (Appellant gives examples of speeding, not wearing seat belt, running red light, etc.).
[35] Although this issue has been addressed in Delaware District Court, it has not presented itself in Delaware State Courts; *see U.S. v. King*, 2007 WL 4233585, at *4 (D. Del. Nov. 29, 2007); *U.S. v. Crooks*, 2008 WL 1908852, at *5 (D. Del. Apr. 29, 2008).

expectation of privacy in one's license plate under the Fourth Amendment. In *U.S. v. Ellison*[36], the Court held that "it is unreasonable to have an expectation of privacy in an object required by law to be located in a place ordinarily in plain view from the exterior of the automobile…. no argument can be made that a motorist seeks to keep the information on his license plate private."[37]

This Court agrees with this ruling and finds that an individual does not have a privacy interest in their license plate tags and therefore, no probable cause is needed for an officer to run an individual's license plate in a law enforcement database. Obviously for the police to stop and question a defendant the officer must then set forth a reasonable articulable suspicion to do so. But the ministerial act of running a tag without probable cause to arrest does not violate the Appellant's substantial rights and no plain error is found.

12. Lastly, Appellant argues that Officer Breslin testified that Appellant carried fictitious or cancelled registration but failed to present physical proof of such.[38] Appellant further contends that the Officer admitted to the court that he had no proof that the car had fictitious tags.[39]

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[36] 462 F.3d 557, 561-563 (6th Cir. 2006).
[37] *See also United States v. Diaz-Castaneda*, 494 F.3d 1146, 1150-51 (9th Cir. 2007); *State v. Crow*, 2007 WL 4197363, at *2 (Iowa Ct. App. 2007); *United States v. Cambronne*, 2006 WL 3618446, at *5 (S.D.Fla. Nov. 16, 2006).
[38] Appellant's Notice to Br. ¶ 3.
[39] *Id.*

This is simply a misstatement of the facts presented. Officer Breslin testified that he ran the tags in the DELJIS database and there was no record of the vehicle being registered in Delaware. He then obtained the vehicle identification number and again was unable to verify any registration of the vehicle. While the Court agrees that no certified record reflecting the lack of registration was introduced and the better practice would have been to do so, it finds Officer Breslin's testimony was properly admitted and no plain error has occurred. The Delaware Supreme Court has previously found that an officer's testimony as to what was discovered during a routine record check of the registration of a vehicle is properly admitted pursuant to Delaware Rules of Evidence 803(8).[40] The same reasoning would apply if no record was found under Rule 803(10).

13. For all the foregoing reasons, Appellant's criminal conviction in the Court of Common Pleas is AFFIRMED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

[40] *Hickson v. State*, 2003 WL 1857529, at *1 (Del. Apr. 7, 2003).